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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 RIO TINTO PLC,

4 Plaintiff,

5 v. 14 Civ. 3042 (RMB)
(AJP)

6 VALE, S.A., *et al.*,

7 Defendants.
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9 New York, N.Y.
10 August 19, 2015
11 Before:
12 HON. ANDREW J. PECK,
13 Magistrate Judge
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1 (Case called)

2 THE COURT: All right. Some documents were just
3 handed to me but we can wait until the appropriate point in our
4 outline to get to that.

5 Based on late last night's letter from Rio Tinto
6 withdrawing the E&Y issues from discussion we can turn and
7 start at page 6 of the joint letter, correct?

8 MR. LYTTLE: Your Honor, there is one E&Y issue
9 remaining. We would like to hand up a Hague letter request.

10 THE COURT: Okay.

11 MR. BLACKMAN: And, your Honor, we, on behalf of Vale,
12 have no objection in concept to the letter of request but we do
13 think that the time period covered by it is overbroad in terms
14 of the parties' previous agreement going back to January on the
15 scope of discovery on this particular due diligence subject and
16 we have an alternative formulation which I would like to hand
17 up, if I might.

18 THE COURT: Have you all talked about this?

19 MR. BLACKMAN: We have, and I am afraid we are at a
20 bit of an impasse on that. The issue, very briefly, your
21 Honor, is that after the initial discovery requests were served
22 back a year ago and responded to, the parties of course
23 negotiated and agreed, ultimately, that the scope of the
24 diligence request to Vale from Rio Tinto would be January 1,
25 2010 through April 30, 2010 -- April 30, 2010 being the date of

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1 the joint venture with BSGR and E&Y was retained by Clifford
2 Chance to assist Clifford Chance in the diligence process. We
3 have no objection to Rio Tinto seeking, through letters of
4 request, to get information from E&Y affiliates that are not
5 subject to subpoena in the United States but we don't think the
6 scope, time-wise, should be any different than the scope of
7 ending April 30, 2010 that has been followed throughout since
8 the issue was first essentially agreed in January of this year.

9 THE COURT: Well, since none of you --

10 MR. BLACKMAN: I have the text.

11 THE COURT: You can hand it up also. What page of the
12 existing letter are we talking about? It would have been nice
13 if Rio Tinto has submitted this ahead of time.

14 MR. LYTTLE: Your Honor, we were negotiating.

15 MR. BLACKMAN: We just got them ourselves which is why
16 they weren't part of the joint letter writing process.

17 MR. LYTTLE: Your Honor, we were attempting to
18 negotiate these up to the last minute with counsel.

19 THE COURT: Are you definitely at an impasse?

20 MR. LYTTLE: We are, your Honor.

21 The date that they're seeking to impose of April 30th,
22 2010, the due diligence, it is not clear it had begun at that
23 point let alone finished.

24 I am looking at the engagement letter which, your
25 Honor, is not even dated until the 7th of April, 2010, it is

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not signed by Vale until May 12, 2010. The focus of the work, your Honor, is FCPA-related analysis looking at bribery and corruption risks and the reports generated from that don't even come until late May. Then we have subsequent engagements with E&Y that come May 12 also looking at risks associated with the transaction, and another one in settlement of 2010, all looking at risks associated with the transaction with BSGR.

So, your Honor, the issue here is more than just this letter of request. We agreed to, in the discovery responses with Vale, our cutoff of April 30th upon the representation that the due diligence was completed at that point. And your Honor, that is clear that is not the case. In fact it is continuing on and it is clear the deal is not even consummated on April 30th, 2010. Not only is it not proper to cut off the subpoena, the discovery from Vale is going to have to expand. We just have seen these documents in discovery.

MR. BLACKMAN: Your Honor, first of all, Rio Tinto has had, since the very first documents were produced in this case, eight, nine months ago, the agreement with BSGR which has a completion date, i.e. a closing date, of April 30, 2010. So, the idea that there wasn't a closed transaction is completely fanciful and due diligence, by definition, was done in connection with signing that document which was a legally enforceable contract.

We don't deny that work was done by E&Y afterwards but

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1 it wasn't due diligence on the deal. This is a bit reminiscent
2 of the discussion we had some months ago of a fictional
3 lookback that supposedly occurred on the diligence years after
4 the transaction closed. Whatever these documents are about,
5 they're not diligence for a closed transaction.

6 MR. LYTTLE: Your Honor, I am happy to show you the
7 engagement letter but we also know --

8 THE COURT: Hand it up. But, if indeed the Vale BSGR
9 transaction closed at the end of April 2010, what's the
10 relevance of what happened afterwards?

11 MR. LYTTLE: Well, the relevance, your Honor, is that
12 these firms are continuing to do due diligence on the
13 corruption and bribery risk associated with that transaction.

14 THE COURT: But there is a contract at that point,
15 April 30th. Either there was or wasn't any knowledge, and when
16 one entered into it as to BSGR misconduct what difference does
17 it make if they learned of it a year later or five years later
18 or whatever else?

19 MR. BLACKMAN: Or today where we agree that it
20 occurred and we learned many years later.

21 MR. LYTTLE: Your Honor, this was an ongoing
22 conspiracy that continued well past the close of this deal. In
23 fact that deal, your Honor, only -- it was a \$2.5 billion deal,
24 they only paid \$500 million up front. They withheld --

25 THE COURT: Only and \$500 million in the same

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1 sentence.

2 MR. LYTTLE: Fair enough. They withheld \$2 billion on
3 confirming that BSGR had proper title. Your Honor, I think it
4 is imminently apparent that the advisor was advising them that
5 Mr. Steinmetz was engaged in corruption. We have seen an
6 e-mail where E&Y produces a due diligence report after the deal
7 which tells them --

8 THE COURT: Let me finish you for one reason and cut
9 you off. Whatever I rule, yes, you'll have a transcript you
10 can show to my counterpart in the UK, but if you don't have an
11 agreement with Vale whether that is based on compromises, they
12 want April 2010, you want today, you compromise wherever; then
13 whatever happens here, they're going to have the rights as
14 certainly E&Y UK will have rights to argue otherwise in the
15 High Court in London. You are much better off having an
16 agreement.

17 MR. LYTTLE: Your Honor, when it is clear that due
18 diligence is advising them of bribery and corruption risks that
19 is extending well past April 30th, 2010, we can't agree not to
20 seek that. That is the most relevant evidence in our case.

21 THE COURT: What paragraphs are we looking at here?

22 MR. LYTTLE: Can I come up and hand the engagement
23 letter to your Honor?

24 THE COURT: Skip that.

25 MR. LYTTLE: Okay.

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1 THE COURT: Let me try to read what you are asking to
2 be produced in the UK. So, it is the letter of request and --

3 MR. LYTTLE: I apologize. The actual topics begin on
4 page 20 and what we are gunning this off of is the engagement
5 letter because they have withheld the report as privileged.
6 That's the only issue we have tabled for further discussion
7 with Vale. So, we have provided specificity, we are keying off
8 the engagement letter and the very clear definition of the
9 engagement letter of the scope of the work which again extended
10 well past April 30th, 2010.

11 MR. BLACKMAN: And the issue, just in terms of
12 formality, is really the first paragraph of what I handed up to
13 your Honor setting forth the relevant time period. But, if I
14 could speak to the broader question for a moment, and I know
15 you admonished us not to argue the merits here, but if you just
16 think about it for a moment, we entered into a binding contract
17 under which we paid half a billion dollars and were
18 contractually obligated to pay additional amounts totaling
19 another \$2 billion or so when various contractual milestones
20 were met. The idea that there is a "ongoing conspiracy," I
21 don't know what that means in this context. We were
22 contractually bound.

23 THE COURT: It means this isn't the summary judgment
24 motion on trial.

25 MR. BLACKMAN: Exactly. That's why I prefaced it with

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1 a disclaimer but I am just saying it makes no sense what he
2 said.

3 THE COURT: Next time not only preface it but bite
4 your tongue.

5 MR. BLACKMAN: Okay, your Honor.

6 THE COURT: Frankly, this looks like it is much ado
7 about nothing because the requests A through O all seem to gear
8 to reports. I mean, some of this may be overly broad and, you
9 know, I don't know whether I should restrict it or say have fun
10 in London. But, to the extent it is dealing with specific
11 reports and subjects of bribery and corruption in and around
12 April/May 2010, it doesn't bother me that we are in May.

13 I am concerned if there was a different report
14 prepared by E&Y UK or any other E&Y entity that is going to be
15 in the E&Y UK files that will get picked up by this.

16 H. I'm not exactly sure what that is and why it,
17 under U.S. discovery, let alone the Hague convention in the UK,
18 is not a fishing expedition. Certainly, as I understand the
19 way the UK deals with it when you are looking for specifics,
20 that's fine. The report, the things immediately leading up to
21 it, drafts of the report. Okay, I think you can probably get
22 that in the UK. When you are talking about e-mails, letters,
23 documents, communications, I don't even know what all of this
24 is.

25 MR. LYTTLE: Your Honor, what we are trying to do is

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1 get after -- we are doing the best we can based on the
2 engagement letter. Many of these documents are being withheld
3 and privilege has not otherwise been provided to us but, given
4 the schedule, we want to get this request out. We tried to
5 subpoena the E&Y U.S. which is the entity Vale identified and
6 they told us to take a hike, told us to go to the UK. We are
7 trying to do that now.

8 THE COURT: To a certain extent you made your bed and
9 now you are lying in it, and by that I mean I am not sure that
10 Vale has any more sway over E&Y in foreign countries than you
11 do over the, you know, various people who did your
12 investigation and you have made them jump through all sorts of
13 hoops, or at least they have had to jump through all sorts of
14 hoops perhaps because of the way Rio Tinto dealt with this so
15 now you are going to do the same thing.

16 How soon, you know, the Court in the UK will deal with
17 this? I am not inclined to limit it but I am not inclined to
18 prevent Vale from going into court in the UK and moving to
19 intervene or using the E&Y lawyers as their proxy behind the
20 scenes and objecting to the time period and the scope of this.

21 Meanwhile, needless to say since I have not seen this
22 before two seconds ago, I am in no position to sign it without
23 looking at it later. So, that's where it is going to go. I am
24 not insisting that they put in your limitation paragraph of
25 limiting it to the period through April 30. I am not sure,

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1 since it is tied to a retainer of E&Y shortly thereafter that
2 it is going to make any difference in the real world and you
3 can do whatever you want to do in the UK.

4 MR. BLACKMAN: Thank you, your Honor.

5 THE COURT: And/or, within the next day you can
6 consider, before this gets sent through the bureaucracy to the
7 UK, whether there is any way you all can spend a little more
8 time and try to come to an agreement either as to the date or
9 as to the paragraphs which, frankly, don't even seem to have
10 been rewritten by Vale that go beyond the reports and the bases
11 for the reports to any and all communications which seem overly
12 broad. And I may well strike it out on my own as I read
13 through it. You will have to wait for that.

14 MR. LYTTLE: Thank you, your Honor.

15 MR. BLACKMAN: Thank you.

16 THE COURT: Okay. So, page 6, the clawback and the
17 interrogatory 22.

18 As to interrogatory 22, it seems to me -- you can sit
19 down, Mr. Liman -- that Rio Tinto should identify the law firms
20 which seems now to be known and the lawyers at the law firms
21 who were involved and what their knowledge is or whatever will
22 be played out down the road.

23 MR. BLACKMAN: Thank you, your Honor.

24 MR. LYTTLE: Your Honor, we are happy to identify
25 these firms. I can do it now. They're not, as we understand

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1 it, responsive to interrogatory no. 22. And, your Honor, the
2 way that interrogatory no. 22 has been, in our view, used and
3 abused in this process it would be wrong, in our current
4 understanding, to identify them. We are not contending these
5 names are privileged --

6 THE COURT: Here is what you are going to do. Then do
7 it as an interrogatory of your own or an affidavit. Just get
8 them in a formal way, not on the record now, the names of the
9 law firms and the lawyers or other staff at the law firms who
10 are involved. How soon can you get that done? Monday?

11 MR. LYTTLE: We can do that by Monday, your Honor.

12 THE COURT: So Ordered.

13 The other issue with respect to this paragraph is
14 clawback of a certain document. Obviously there is a 502(d)
15 order in place so the only question is not the fact that you
16 have it, Mr. Liman, but whether the document itself is
17 privileged or not. Why don't you hand the document up?

18 MR. LIMAN: Your Honor, that is what you have in front
19 of you.

20 THE COURT: Ah.

21 MR. LIMAN: You have three documents in front of you;
22 the first document is the document at issue, it is Bates
23 labeled RTTAR 26596 and, just to be clear, we are not seeking
24 the entire document, we are seeking only portions of it. We
25 accept a claim of privilege and relevance with respect to some

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1 of it. What we are seeking is the initial e-mail from an
2 Eileen Lerum, L-E-R-U-M, that is dated May 22nd, and then the
3 Trudy Stedman e-mail that is the last in the sequence but there
4 we are seeking the first two paragraphs and then the item
5 marked no. 2. We are not seeking the item marked no. 1 which
6 does appear to contain privileged information.

7 If I could just be clear, also, about the other
8 documents we passed up? They belong together. There is an
9 e-mail dated June 3rd, 2009 Bates stamped RT 652172 to 73 and
10 then the attachment which is Bates stamped 2174. Those are the
11 due diligence notes for the offering. And on page 2184 there
12 is a reference to the preparation of a lawsuit with respect to
13 Simandou against BSGR. That information tracks the information
14 that is in the document at issue.

15 One last thing to note, you will see that there is a
16 threshold of \$350 million that is referred to in the document
17 at issue. That number happens to correspond to about 5 percent
18 of Rio Tinto's operating income which, given the initial
19 e-mail, is not accidental, this is a document about accounting
20 prepared for accounting purposes consistent with the relevant
21 accounting literature to report loss and gain contingencies to
22 the --

23 THE COURT: All right. Now let's go back. I don't
24 see where on page 2184 what you are talking about so without
25 reading into a public record anything that is attorney's eyes

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1 only or whatever, just try to clue me in.

2 MR. LIMAN: Your Honor, if you look at 21083, item,
3 the heading is 7 which asks for an update on the situation.

4 THE COURT: Okay. Got it. Okay.

5 MR. LIMAN: And then, actually, if you follow down the
6 bullet points on 2183 and 2184 --

7 THE COURT: Am I correct that there is no claim of
8 clawing back either of these two documents, the 652172 or the
9 652174, et al?

10 MR. LYTTLE: That's correct.

11 THE COURT: Okay. With that, I guess let's take it in
12 pieces.

13 Is there any objection to producing the Eileen Lerum
14 e-mail?

15 MR. LYTTLE: No.

16 THE COURT: Okay, so you will do that or reproduce it
17 in such a way that it is not attached to material that may or
18 may not be clawed back.

19 Now, with respect to the e-mail from Trudy Stedman, I
20 guess if you have the information otherwise -- and this sort of
21 goes to both sides, if you have the information why do you need
22 the e-mail unless it gets you a slightly different date? And
23 conversely, to Rio Tinto, if that same information is in a
24 document that isn't privileged and Mr. Liman is willing to have
25 redaction of other information from the Trudy Stedman e-mail,

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1 why are you all fighting in front of me on this?

2 MR. LIMAN: Your Honor, maybe I will go first in terms
3 of why we want the document and it has to do with evidence.

4 This document, to us, is frankly one of the best
5 pieces of evidence in the case that establishes that back in
6 2009 two things; no one, Rio Tinto was aware of the injury, and
7 no. 2 -- and that, your Honor, is a contested question on
8 motion to dismiss, one of the things that Rio Tinto says is the
9 injury occurred later on. This makes it clear they were suing
10 for something or intended to sue for something, instructed to
11 sue for something.

12 Second, your Honor, what this document shows is that
13 the very lawsuit that they're bringing now with the exception
14 of the allegations about Cilins, all of which goes back to
15 things about corruption, are things that they could have
16 brought in 2009.

17 Now, there will be argument, no doubt, by Rio Tinto,
18 that this document doesn't disprove their claim of equitable
19 tolling but it clearly is highly relevant to the subject of
20 equitable tolling when you have an instruction bringing a
21 lawsuit against BSGR in the jurisdictions as to which BSGR is
22 subject to personal jurisdiction.

23 MR. LYTTLE: Your Honor, I think what is nice is we
24 don't actually have to debate this.

25 Mr. Liman, there is another document he can share with

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1 you which I would like it pass up which if I may approach, your
2 Honor?

3 THE COURT: Yes.

4 MR. LYTTLE: Which indicates that this contemplated
5 lawsuit in 2009 had nothing to do with bribery or corruption or
6 fraud. The time period is critical there. Rio Tinto was still
7 mining and still has its equipments on blocks 1 and 2 and
8 Mr. Steinmetz is moving in.

9 THE COURT: Isn't all of that the issue that Judge
10 Berman or the jury is going to have to decide? And what I have
11 got to decide for discovery purposes is is this privileged, do
12 you care because you are going to say it had nothing to do with
13 this anyway. Under 502(a), particularly if you are ordered to
14 produce it over at least a weak objection you have not got a
15 waiver of subject matter. So, you know, why do you care? What
16 do I care?

17 MR. LYTTLE: I appreciate that, your Honor, because it
18 is clearly being misconstrued. It is not relevant to the
19 equitable tolling and weighs into the privilege.

20 THE COURT: Excuse me. That I can't decide.

21 MR. LYTTLE: But you can, your Honor. You have a
22 letter sent to Mr. Steinmetz and Mr. Avidan which is the exact
23 legal proceedings contemplated there and it just says, Get your
24 equipment off our blocks, you are interfering with our rights.
25 It doesn't say we are suing you for bribery. Nothing indicates

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1 that they are looking at Vale, nothing in that document that we
2 are clawing back indicates they're looking at a RICO
3 conspiracy. Nothing even indicates they're looking at fraud.

4 THE COURT: I agree with you. The document says what
5 it says.

6 MR. LYTTLE: Your Honor, on the privilege issue I
7 think your point is well taken. They have this clearly in
8 other sources and it is in a different form. This is all
9 attorneys talking about this and it is talking about the value
10 and the damages none of which is included in this document they
11 have. So, there clearly was a change. They've got the
12 official non-privileged version. We didn't withhold it, all we
13 withheld was a privilege discussion among lawyers and only
14 lawyers about legal strategy and the legal status of cases.

15 MR. LIMAN: Your Honor, obviously with respect to
16 privilege, the fact that lawyers are on it is not the question
17 that is a dispositive of question of privilege. The underlying
18 questioning is is this a communication that either reflects
19 legal advice or is made for the purpose of obtaining legal
20 advice. The document, on its face, reflects an instruction.
21 The only conceivable claim with respect to reflecting legal
22 advice is what my colleague just said with respect to damages
23 but even that is not a good argument because the threshold is
24 an accounting threshold, it doesn't say this is the value of
25 the lawsuit. It just says it exceeds that.

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1 But, with respect to an instruction to bring a
2 lawsuit --

3 THE COURT: So, let's see if we can refine this
4 further.

5 If the paragraph about damages is redacted is the fact
6 of an instruction to counsel in the paragraph immediately above
7 that which is a factual matter that may or may not be relevant
8 to the statute of limitations issue, anything that you care to
9 fight about?

10 MR. LYTTLE: Your Honor, I think with that and I think
11 with the other redactions Mr. Liman discussed in particular
12 paragraph 1, I am not sure I agree with you. I am not sure
13 this is worth fighting over anymore.

14 THE COURT: In that case, make all of those redactions
15 and produce a copy in redacted form by Friday that can be
16 utilized and that does not have the clawback aspects of it.

17 MR. LYTTLE: Thank you, your Honor.

18 THE COURT: In order to not have quasi-privileged
19 material floating around in my already overflowing files I am
20 giving you all back your various documents.

21 So, now we jump all the way over to page 13 to which
22 you promised me an update that I don't really need or want at
23 this point so let's skip that and go over, that's why the
24 Special Master is here, so I don't have to delve into it and by
25 here, yes, I have noticed she is in the courtroom but I meant

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1 that she has been appointed so that I don't have to deal with
2 the tar-related problems unless you don't agree with any of her
3 recommendations and she writes a report and somebody objects
4 and I deal with it.

5 So, now we go to page 14, IV, BSGR and Steinmetz. My
6 first question to all of you is: Why me? Which is to say this
7 is discovery, at least for now under the auspices of the Court
8 in the UK. What authority -- I will rephrase -- not what
9 authority -- I have the authority to convert all of this back
10 into federal rules of discovery which is something that we all
11 have been trying to avoid until Judge Berman rules on the BSGR
12 Steinmetz motions for lack of jurisdiction, etc.

13 So, this may be an issue that if you all could work
14 out I would be happy to help you, perhaps, but otherwise, what
15 is my authority?

16 MR. FORST: Your Honor, Keith Forst on behalf of Rio
17 Tinto.

18 So, I think your Honor hit the nail on the head on
19 what we are concerned about which is that we are waiting for
20 Judge Berman's decision which could very well mean that as we
21 think it is going to be is that BSGR is subject to personal
22 jurisdiction here and subject to the Federal Rules of Evidence
23 for purposes of discovery. I know, your Honor, we jockeyed
24 over that issue months ago and we went to the UK, again on
25 promises of BSGR that we would make a production and make a

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1 comprehensive production again somewhere in the middle between
2 UK and U.S. proceedings. Where we think your Honor can give
3 some guidance is one we would respectfully submit, if we think
4 now is the time that quite hasn't worked out the way we hoped
5 and we are in a position of if Judge Berman rules, we are going
6 to be behind months threatening depositions.

7 THE COURT: First of all, you all seem to be falling
8 behind on your own without any help from the Court as we have
9 already pushed back the document production schedule and all of
10 that stuff. You know, it would be nice if Judge Berman rules.

11 MR. FORST: Sure.

12 THE COURT: It would be nice if there weren't a
13 million satellite trucks outside and they're not for you,
14 they're for another case in front of Judge Berman. Life is
15 short. If and when Judge Berman says they're here, then we can
16 revisit any discovery issues and convert the Hague Convention
17 requests to good old normal Federal Rules of Civil Procedure.
18 Having gone the route of going to the Hague by consent, it
19 seems a little unseemly to say nothing has changed in terms of
20 whether or not BSGR-Steinmetz are subject to U.S. discovery and
21 U.S. jurisdiction because Judge Berman has taken too long in
22 your view to rule but you would like, you know, a second bite
23 at the apple here and I am not inclined to do that now.

24 I agree with you that if you don't work it out with
25 BSGR they will be in the position and under a very tight time

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frame so I'm telling you that now, under the BSGR side, that if Judge Berman says you are here and the document production out of the UK is not sufficient because of the different standards or because they don't have a process like this where the parties can come in and complain that you didn't fully comply with the Hague Convention requests, you are not going to get 30 days, you are going to get a week or something to redo what you have to redo. So.

MR. FORST: Your Honor, if I may?

I do think the one thing that we are asking -- and I can go through the list in a minute, but with search terms -- is, again, what we are trying to do, from Rio Tinto's perspective, is a discussion. We had a productive meet and confer where we sent search terms and we simply asked can you run these? Or even some of these and give us some hits and we can take a look at that and further the discussion. We got blank across the board. The response that came back that said we will not run an additional term. And so, really our request to you, your Honor, with those search terms which is what we discussed at the last conference, was can we just run these and we think there are some gaps and admittedly a production of 1,500 documents as compared to the tens and tens of thousands that are coming from the other parties and BSGR is just as involved, suggests that it was far too narrow and that's what's been born out. So, we asked for terms and they've been flatly

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1 refused without any real justification.

2 THE COURT: Who am I going to hear from from BSGR?

3 MR. McCARTHY: Your Honor, Tim McCarthy for BSGR.

4 There is a threshold issue here. At the last
5 conference my colleague Mr. Filardo agreed to provide the
6 search terms in culling the universe of documents in response
7 to an inquiry from the Court and that inquiry from the Court,
8 in turn, was based on representations from counsel to Rio Tinto
9 about putative deficiencies in our production. That matters
10 because these requests for additional search terms can't be
11 merely speculative. As the Court knows, there has to be some
12 indicia of deficiencies before that can be done. We agreed
13 consensually to do it in the meet and confers. After that it
14 turns out those representations about the supposed deficiencies
15 in our production were wrong. For instance, Rio Tinto, in the
16 July 24 joint letter and in the July 28th hearing, represented
17 that there was a 2009 programming budget that had not been
18 produced and that related documents had not been produced. In
19 fact, it was and related documents had been produced.

20 There was a particular letter in response to request F
21 of the letter of request that was identified later in meets and
22 confers as something that was supposedly missing. It was
23 produced.

24 I have a list of things as well. Bottom line is that
25 to this day there has yet to be an identification of an actual

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1 deficiency anywhere in the production that would have justified
2 the --

3 THE COURT: That may now be true, however it would
4 appear that the search terms that were used do not comport with
5 the case law on crafting of search terms. I mean, to only use
6 Mr. Cilins' last name without a variant on his first name and
7 belated issues as pointed out here, you know, that you very
8 specifically searched for the term "land cruiser" but not other
9 variants on that, that does strike me, under Judge Facciola's
10 decision about where angels fear to tread and the need for
11 expertise in crafting search terms, as well as my William A.
12 Gross warning to the bar that these search terms certainly
13 could have been better.

14 So, the question is, having in for a penny you want to
15 be in for a nickel here, what is the harm in running the extra
16 search terms they suggest and just seeing how many hits there
17 are and then discussing that with them and then seeing whether
18 there is not going to be anything there? You know the problem
19 in proving a negative on the other side has conspiracy all over
20 the place is that if there is no conspiracy there aren't going
21 to be any documents.

22 But, I would say despite Sedona principle 6, your
23 search terms left something to be desired.

24 MR. McCARTHY: And we would argue, your Honor, that
25 both the problem with that and the answer to that is that the

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1 case law here doesn't apply. This is governed by the principal
2 of proportionality under English law.

3 THE COURT: Guess what? Our principle of
4 proportionality is the same as theirs.

5 MR. McCARTHY: That's right, and the "land cruiser"
6 example is a good one. That request, in particular, calls for
7 "the receipt or the invoice for the land cruiser." It doesn't
8 call for any and all documents pertaining to "land cruisers."
9 It doesn't call for any and all documents --

10 THE COURT: Did you produce the receipt for the land
11 cruiser?

12 MR. McCARTHY: I do not know whether we produced the
13 receipt, your Honor. I am filling in. If I may turn to my
14 associate for a moment?

15 THE COURT: Yes.

16 (Counsel conferring)

17 MR. McCARTHY: It turns out that nothing turned up,
18 your Honor.

19 THE COURT: That's the problem.

20 MR. McCARTHY: That is the problem.

21 THE COURT: Is it because a land cruiser was not
22 gifted to somebody? Or is it because the search term "land
23 cruiser" may not be the way the invoice for the car was printed
24 up? You know, however it may be. So, I am not saying you need
25 to search for all documents about the land cruiser but if you

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1 didn't find it and the only thing you did was to search for the
2 term, in quotes "land space cruiser" which might have been
3 spelled differently, which might have been done as one word
4 without a space and this wouldn't pick that up, other
5 deficiencies, again, I'm not ordering you to do anything other
6 than to consider what is going to happen either. You are going
7 to get out of this case on jurisdictional grounds or you are
8 likely going to be running these very search terms and many
9 others down the road. The more you get out of the way now by
10 working somewhat collegially under the Sedona cooperation
11 proclamation principles with Rio Tinto, you know, most likely
12 the revised search term around the land cruiser is either going
13 to turn up one document or nothing. Or, since you couldn't
14 find the invoice which is what was called for but you find an
15 e-mail saying we decided against giving him a land cruiser or
16 whatever, you know, you might voluntarily produce that.

17 All in all, I am strongly suggesting you work with Rio
18 Tinto on the search terms as shown by the examples on page 15
19 of the letter but I'm not ordering it.

20 MR. FORST: Okay, your Honor.

21 THE MARSHAL: Understood, your Honor.

22 MR. FORST: To be clear, we, in drafting the search
23 terms which I did myself, we were sensitive to their concerns
24 of proportionality. I wanted to put in the term "car" which of
25 course would have brought back things maybe we would run in the

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1 U.S., but we purposefully tried to trim them back to make sure
2 they were on point in connection with these requests.

3 So, I appreciate that and we will endeavor to work
4 together.

5 THE COURT: We are heading towards an hour, can we
6 move on to something I have jurisdiction over?

7 MR. FORST: Sure. I do have, I do want to point out
8 the custodian issue quickly, though, that is only with respect
9 to these two individuals that we note in our submission where
10 we had the understanding last fall --

11 THE COURT: This is Mr. Toure and Mr. Bangoura?

12 MR. FORST: Correct; that BSGR had documents for these
13 people.

14 THE COURT: They don't. So now what?

15 MR. FORST: They don't but what is troubling to us,
16 your Honor, is if you remember the reason for that now is the
17 Guinean government apparently seized them some time ago. We
18 didn't know that until now but if you remember, based on
19 discussions with VBG, there are procedures whereby the parties
20 whose documents are seized can go to the Guinean government and
21 request them. What shocks us is we are now almost a year later
22 and maybe counsel will correct me, but there is no indication
23 that there has been any attempts on BSGR to go request from the
24 Guinean government these documents for people who were seized
25 because of bribery, the very allegations in the case.

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1 THE COURT: Do these people still work for BSGR?

2 MR. McCARTHY: No, your Honor.

3 MR. FORST: But they have a right to the documents
4 taken related to their employment.

5 THE COURT: I understand. What is BSGR's incentive,
6 not to mention legal issue other than being more forthcoming if
7 they knew this longer ago than now, and I suspect some of this
8 is BSGR, unlike its counsel, is having as little involvement in
9 this case as possible.

10 In any event, yes, it is unfortunate. Contact
11 Mr. Toure and Mr. Bangoura, they're no longer within the BSGR
12 ambit if they're ex-employees. If you want to ask them to ask
13 the government for their documents, be my guest.

14 MR. FORST: Your Honor, you did require VBG to make
15 that formal request of the Guinean government because these
16 documents do belong to BSGR. These two individuals were BSGR
17 employees and these are their documents that they have a right
18 to.

19 THE COURT: Who is, under the law, the Guinean law --

20 MR. FORST: Right.

21 THE COURT: -- is it the person or the corporation?

22 MR. FORST: The corporation, as we understand it,
23 through Guinean counsel working with VBG. VBG had the right to
24 request the documents taken from their employees from their
25 facilities, from everything.

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1 THE COURT: Mr. McCarthy?

2 MR. McCARTHY: Your Honor, as I think you have alluded
3 to, the only disclosure obligation that we are under at this
4 point -- we fully take on board your admonition about the
5 timeline -- but the only discovery obligation that we have is
6 letter of request, the High Court's order on the letter of
7 request. The letter of request is specifically directed
8 towards servers, documents, materials within the UK. We in
9 fact have gone above and beyond and included in our production
10 in response to that letter of request materials from Guernsey,
11 from Israel, and from South Africa. Materials within the
12 possession, custody and control of the government of Guinea
13 because they were seized several years ago are not covered by
14 that letter of request.

15 THE COURT: That is true. The question is sort of do
16 you want to make that request now which will probably be
17 ignored anyway but then you could say you were a good corporate
18 citizen in my court, and then if and when you get any documents
19 from the government of guinea you will decide what you want to
20 do with them. Or you can say I have taken the position so far
21 which, if you know me enough, I might reconsider, of not
22 putting you through U.S. discovery.

23 THE MARSHAL: Understood, your Honor.

24 THE COURT: What is the harm of writing a letter to
25 the government of Guinea saying we have learned that documents

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of your employees were seized, I would like copies.

MR. McCARTHY: There may be none and we will take it under advisement, discuss it with counsel of Rio Tinto and have a look at what VBG was ordered to do. Standing here today I am not conversant to that and can't consent to it.

MR. FORST: Let me respectfully point out that we didn't include things in the letter of request that we didn't know about. Again, last November we had the understanding that they had the documents.

THE COURT: Had you known I sincerely doubt that my colleague in the UK has any more authority to order the government of Guinea to do something, nor would it normally be a discovery obligation in the UK to go get documents seized by another government.

MR. FORST: Well, maybe not, but we would have been given the opportunity to go make that argument there and pursue it for sure. Now, instead --

THE COURT: You may be going back there if some of the issues that I am not getting involved in are not worked out by agreement.

MR. FORST: Okay.

THE COURT: I suppose they have motions to reconsider or, you know, help. Whatever.

MR. FORST: Sure.

THE COURT: I'm not ordering them to do anything. I

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1 again am suggesting cooperation. If not, if and when they are
2 subject to the U.S. jurisdiction we will deal with it and, you
3 know, the inability to produce the material may or may not,
4 under the December 1st version of 37(e) impose any further
5 obligations or penalties on BSGR. For today we are moving on.

6 MR. FORST: Your Honor, I only want to make clear that
7 relates to the rest of the things in our letter that we are
8 skirmishing about. You are encouraging us to go work it out.

9 THE COURT: I always encourage parties to cooperate
10 about everything. So far my success rate in this case is not a
11 hundred percent. We will put it at that.

12 As to discovery from Defendant Thiam, I don't think
13 there is really anything you are asking me to rule on. It
14 looks like everybody is cooperating? Anything further on that?

15 MS. McCAFFREY: No, your Honor.

16 THE COURT: Good.

17 Next the discovery from VBG, particularly with respect
18 to the documents of Mr. Rezende. So, is he a Vale employee or
19 a VBG employee? Both?

20 MR. FORST: Your Honor, let me just --

21 THE COURT: Well, Mr. Blackman has more information.

22 MR. BLACKMAN: Yes.

23 He is somebody who certainly was a Vale employee. He
24 may still be a Vale employee. Like others, he was secunded to
25 VBG in the period after the creation of the joint venture.

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1 THE COURT: So why are his e-mails not being searched?

2 MR. BLACKMAN: His e-mails in fact have been produced
3 in many respects. He was not sought as a custodian. However,
4 my understanding is that we actually have produced or are
5 producing about 120 e-mails in which he was either a "to" or a
6 "from" as part of our production of documents.

7 THE COURT: Coming from somebody else's files?

8 MR. BLACKMAN: Yes, exactly. So, it is not like --

9 THE COURT: What would the burden be -- and I don't
10 know if the cost is yours or VBG's but since he has two hats, a
11 Vale hat and VBG hat, why aren't you going to search his files
12 at least for his VBG-related role?

13 MR. LIMAN: Your Honor, I spoke to him this morning.
14 I got questions also. I gave the questions we were going to
15 ask him to counsel for VBG. The answer is about \$150,000 to
16 get his custodial e-mails, to search them and to review them.

17 There is also a more fundamental point with respect to
18 Mr. Rezende. Mr. Rezende began working at VBG in April of
19 2011. He ceased working there in December of 2012. Prior to
20 April 2011 he had no involvement with the Simandou project.
21 While he was at VBG he had no responsibility with respect to
22 any of the alleged trade secrets, that is, with respect to the
23 port and the rail options. Those were already in place as of
24 April 2011, he had nothing to do with them. As to drilling
25 site selection for Simandou I and II and resource estimates,

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again, that was largely done before he arrived. He had nothing to do with them.

We asked about the technical committee because that's been an issue. He did not prepare, was not involved in the preparation of the responses for the technical committee.

Now, a long time ago when we were in front of your Honor with respect to trade secrets back in November, the issue came up of what about the utilization of information allegedly taken. Your Honor said back then that the utilization of alleged information was not particularly relevant except for a limited time period after it was allegedly taken which would be 2009. After that, if they were involved in the joint venture, etc., it would have been getting information from other sources and it gets very complicated, keep it limited to begin with.

So, that's the reason why we think Rezende has really nothing to do with this case.

MR. FORST: Your Honor, this is admittedly, and maybe we will take that time period for which he worked for VBG which is a different entity, we have different discovery requests for VBG and have agreed to different search terms and that is happening in parallel with VBG. VBG has said, and I think VBG's counsel is here and can speak, that they have requested Mr. Rezende' e-mails for the time period that he worked for VBG and I will note, your Honor, we have a original chart where he was second in command over all these technical areas including

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1 railways.

2 THE COURT: So, let me hear from VBG counsel. Just
3 remind me who you are.

4 MR. TREMONTE: Michael Tremonte, your Honor.

5 I would like to follow up on Mr. Liman's remarks
6 because what is true with respect to Mr. Rezende is in fact
7 true with respect to each and every one of the VBG custodians
8 whose e-mail accounts were hosted by Vale.

9 THE COURT: Okay, but that ship has sailed. You had
10 an argument on that. You agreed or a ruled. Sobeit. The only
11 problem seems to be with Rezende because you want the e-mails
12 so that you can go through them and do what you have to do and
13 Mr. Liman, according to the letters or his counterpart, said
14 no. So --

15 MR. TREMONTE: Well, with respect to Mr. Rezende our
16 position is set forth in the letter and it is even clearer
17 after today that he was a Vale employee and he is therefore not
18 a custodian --

19 THE COURT: April 2011 through December 2012 he was
20 secunded to you. That makes him your employee for that
21 purpose.

22 MR. TREMONTE: I'm not sure that that is right. I
23 think the fact that he was on premises or at the site is one
24 thing but I don't know that he was --

25 THE COURT: Was he the no. 2 to whoever the no. 1 was?

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1 MR. FORST: In the original chart, your Honor, the
2 no. 1 says vacant so he is the no. 2 with the name there.

3 THE COURT: All right.

4 MR. TREMONTE: I have to go back and confirm his
5 precise position but I don't believe there is a legal argument
6 that he was an employee of VBG.

7 THE COURT: The legal argument seems to me somebody
8 has to do something between you and Vale and the question may
9 be who is paying for it, what the extent of the search is and
10 how much, if any, Rio Tinto wants to kick in. Are you telling
11 me, Mr. Liman, that the \$150,000 estimate you had is for the
12 year, less than a year and a half period of April 2011 to
13 December 2012? Or is it for his entire period for which Vale
14 has files?

15 MR. LIMAN: Your Honor, I believe it is for the
16 relevant time period. It is a very rough estimate but that is
17 the --

18 THE COURT: Is that for the cost of search or what,
19 exactly?

20 MR. LIMAN: It is the search, it is review, it is
21 designation as ADO, privilege review and the like.

22 I can answer your Honor's question with respect to his
23 role. He was one of three people who were recorded during the
24 time period that he was there, to the person who ran VBG. His
25 responsibilities were largely operational ones. There were

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1 people who preceded him who were involved with respect to the
2 issues of site selection and the ports and the like. Those
3 people's e-mails, my understanding is, are being produced.

4 MR. TREMONTE: And if I may, your Honor, all of the
5 remaining custodians that are still being discussed -- I think
6 there is 10 -- fall into this category and if, at \$100,000-plus
7 each we are going to spend a million dollars reviewing e-mails
8 when we know in advance, almost to a certainty, that there is
9 nothing relevant.

10 THE COURT: Here is what we are going to do: You are
11 going to do a sample in some way that you are going to work out
12 with Rio Tinto as to whether there is going to be anything
13 relevant. So, if there are -- I think we are back in the key
14 word world for this -- come up with key words and Vale and VBG
15 and we are going to limit it to the VBG time period, you will
16 figure out which of them is footing the bill for this or how
17 they're going to do it and you will come up with something that
18 is going to cost somewhere in the neighborhood of \$5,000, maybe
19 10, no more than that, and see whether there is or isn't
20 material that Mr. Rezende has in his VBG period that is not
21 being picked up by the other custodians. And if there are
22 other custodians that are being fought about it is not in the
23 letter to me so it is not on the table for today.

24 MR. TREMONTE: Your Honor, if I may?

25 THE COURT: You can snatch what I think is some

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1 victory for you, you know, and get into a worse position, but
2 go ahead.

3 MR. TREMONTE: Okay. In that case, your Honor, I just
4 want -- a little bit of housekeeping I want to clarify the
5 record.

6 Last time I was before the Court I failed to report,
7 because I didn't know at the time, that on the day before all
8 of the documents that had been in the possession of VBG's prior
9 counsel in Paris that had been produced to the technical
10 committee had in fact been produced to Rio Tinto before I
11 appeared. I don't want the record to be inaccurate in that
12 respect.

13 THE COURT: Good. All right. I am sure I am going to
14 regret this question but are there any additional issues that
15 we need to deal with today that are not in the letter in front
16 of me?

17 MR. LIMAN: Your Honor, there is a discrepancy with
18 respect to the reservation of rights on the E&Y documents. We
19 previously wrote to Mr. Forst to indicate the nature of the
20 reservation. I assume we don't need to lodge that with the
21 Court? And if it becomes an issue I --

22 THE COURT: If it was in a letter you advised me of
23 it. I am sure I won't remember it any more or less when it
24 becomes a live issue, whether you raise it today or just in the
25 letter.

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1 One housekeeping matter. Why doesn't Rio Tinto put
2 together for me all of the letter briefing that I have gotten
3 on the, whatever the name of your document is, Mr. Liman.

4 MR. LYTTLE: Nardello, your Honor.

5 THE COURT: Thank you; so that way I will have it all
6 in front of me again and I will get it?

7 MR. LYTTLE: Would you like it in addition to filing
8 ECF or hand-delivered to you?

9 THE COURT: Since it has all been previously filed on
10 ECF just send a set with a cover letter "over by hand" or by
11 "Fed Ex," whatever.

12 MR. LYTTLE: Okay. We will do that, your Honor.

13 One housekeeping matter on the E&Y letter
14 conversations taken today and your Honor's advice and thoughts
15 into it. I think we may make some revisions so I request that
16 perhaps you hold off in reviewing that one and we will submit a
17 separate one.

18 THE COURT: Well, here is the issue that I think I
19 have told you before: Friday is my last day in the office for
20 two weeks. If you get me something before Friday I can sign
21 it. While discovery emergencies or whatever my clerks will be
22 working and can get things to me, a letter of request does not
23 work well on a Blackberry or even an iPad. I am not going to
24 deal with it during those two weeks. So, whatever your urgency
25 is or isn't, if you get me something know that I have got

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1 Friday fairly heavily booked. So, if you get me something
2 before Friday and I have a chance to look at it, I will sign
3 it. If you don't, I won't.

4 So.

5 MR. LYTTLE: We will, your Honor.

6 MR. BLACKMAN: And on that score, your Honor, again
7 taking on board what you said, we would like to see the draft
8 and hopefully have a chance to have some input into it, so
9 maybe as our other letters of request were, this can be agreed
10 as opposed to not.

11 THE COURT: I think, A, agreement is highly unlikely
12 and I think reading between the lines what I am hearing is that
13 some of the requests that might be perfectly fine in American
14 parlance, you know, documents, communications, e-mails, etc.,
15 they may be trying to sharpen. Certainly if you are adding
16 anything as opposed to subtracting I expect you to let
17 Mr. Blackman have a small window of opportunity to look at it.
18 If all you are doing is narrowing if, again, you know, if the
19 two-week gap urgency is such it might be that with today's
20 discussion you can, indeed, get agreement. Maybe that's
21 hopeless. I leave it to all of you.

22 MR. BLACKMAN: Thank you, your Honor.

23 THE COURT: Date for our next session? What is your
24 pleasure? What do you need?

25 MR. LIMAN: Your Honor, I don't know that we have a

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1 calendar in front of us with a particular day and date of the
2 week, but if we could have a date sometime shortly before
3 September 27th? September 27th is a day that a number of us
4 will be out of town.

5 THE COURT: The 27th is a Sunday, we can do it the
6 afternoon of the 24th which is the day after Yom Kippur. If
7 that works we can do it the week before so we are not near Yom
8 Kippur. Whatever you all want.

9 MR. LIMAN: The only thing I would ask is if we do it
10 the day after Yom Kippur, if we could set a time period for
11 submitting the letter to your Honor so that those of us who are
12 observant are able to observe the holiday.

13 THE COURT: If we do it on Thursday the 24th you can
14 get the letter in on Monday, the 21st, or the morning of
15 Tuesday the 22nd. Whatever your pleasure is on that.

16 MR. LIMAN: Your Honor, I think that works for
17 everybody. We would also ask that the letter go in on Monday
18 night that would give your Honor a chance to review it.

19 THE COURT: Yes, since they tend to be long letters.
20 All right, September 24th, 2:30.

21 All right. So, enjoy the rest of your summer even
22 though I know you are all working hard. For those it applies
23 to, Happy New Year in advance since I won't see you until
24 afterwards.

25 We are adjourned.

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1 Usual drill with the transcript; reading the Court's
2 rules you all have to buy it.

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